



Neil Bosworth  
Superintendent, Tonto National Forest  
Phoenix, Arizona 85006  
Email to [nbosworth@fs.fed.us](mailto:nbosworth@fs.fed.us) & Submit online at [www.ResolutionMineEIS.us/Comment](http://www.ResolutionMineEIS.us/Comment)

November 7, 2019

**Re: Comments on Resolution EIS & Request for Extension to Enable Requisite Public Involvement in Section 106 Process**

Dear Mr. Bosworth:

Thank you for the opportunity to comment on the Draft Environmental Impact Statement (DEIS) for the proposed Resolution Copper Project and Land Exchange (RCPLx). In essence, Archaeology Southwest advises the Tonto National Forest (TNF) that it has not afforded Archaeology Southwest and many other interested members of the public an adequate or appropriate opportunity to comment on the cultural resource issues raised by the RCPLx DEIS. In particular, we are advising TNF, and by copy of this letter the Arizona State Historic Preservation Officer and Advisory Council on Historic Preservation, that the descriptions and analyses of the historic properties, the assessments of eligibility and effect, and the measures to resolve adverse effects contained in the DEIS are incomplete and fail to enable meaningful or sufficient public involvement in the Section 106 process prescribed by the National Historic Preservation Act.

As discussed below, because TNF has relied and is relying on the DEIS, exclusively, to afford the public an opportunity to learn about, participate in, and offer feedback on and in the Section 106 process for RCPLx, Archaeology Southwest advises TNF to extend the public comment period to enable compliance with the regulations at 36 CFR 800.2(d)(1). Those regulations state, in part, “The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties.” The extension we request must, of course, be accompanied by substantial amendments to the DEIS or by other means through which TNF will provide the public with non-sensitive information about (1) the historic properties that would be affected by the RCPLx (that is, types, sizes, affinities, general distributions, National Register of Historic Places [NRHP] eligibilities, and patterned correlations among these attributes, etc.); (2) the planned or reasonably foreseeable adverse effects—direct, indirect, and cumulative—of RCPLx on historic properties (that is, the nature, extent, general distributions, timing, and intensities of effects); and (3) the plans and options for resolving adverse effects to historic properties. Neither





the DEIS nor the DEIS Appendix O draft Programmatic Agreement provide the background documentation or foreground analyses and assessments necessary to enable adequate public involvement in this massive, highly complex, and unmistakably consequential Section 106 process.

Archaeology Southwest is a Tucson-based nonprofit organization dedicated to the preservation, enjoyment, and investigation of heritage places of the American Southwest. Archaeology Southwest’s mission mandates collaborations with tribes, private partners, and federal, local, and state governments to explore and protect the places of the past. This mandate, together with our ethical obligations as cultural resource researchers and stewards, targets our comments on two issues in public land and resource management.

1. **Cultural resources** refer to places, objects, and traditions created in the past and valued in the present. Fragile, generally irreplaceable and nonrenewable, and too often subject to damage and abuse, cultural resources are vital bonds among human generations and between humans and landscapes. Although “cultural resources” is not explicitly defined in U.S. Federal statutes or regulations, innumerable laws, policies, and customary practices affirm the high significance of cultural resources as venerable and veritable sources of national identity and of senses of orientation, place, belonging, and distinctiveness for America’s diverse and interdependent constituent communities.<sup>1</sup> The existence of cultural resources—as well as their settings, locations, materials, workmanship, feelings, and associations—have profound significance and day-to-day implications for individuals and communities who derive benefits from cultural resources’ diverse values: aesthetic, economic, educational, energy, historical, inspirational, political, scientific, social, spiritual, etc. Government land management too often neglects legal and practical mandates to consider cultural resources on par and in conjunction with biophysical aspects of the environment. The two are indivisible and merit similar and integrated levels of consideration in planning and implementing government actions.<sup>2</sup> Close consultation with communities affected by government land management, especially interested tribes, must complement scientific research as an essential basis for management plans and actions.

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<sup>1</sup> Definitions for some types of cultural resources are available in the *Electronic Code of Federal Regulations*, notably *historic properties* (at [36 CFR 800](#)); *human remains, cultural items, and cultural patrimony* (at [43 CFR 10](#)); *archaeological resources* ([43 CFR 7](#)). *Sacred sites* is defined in [Executive Order 13007](#). The regulations implementing the *National Environmental Policy Act* ([40 CFR 1500](#)) affirm cultural resources as elements of the human environment that require focal consideration in the adoption and execution of Federal Government decisions.

<sup>2</sup> The USFS (2015, FSH 2309.12, Heritage Program Management Handbook, page 12, [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd517819.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd517819.pdf)) defines a cultural resource as “An object or definite location of human activity, occupation, or use identifiable through field survey, historical documentation, or oral evidence. Cultural resources are prehistoric, historic, archaeological, or architectural sites, structures, places, or objects, and traditional cultural properties. In this Handbook, cultural resources include the entire spectrum of resources for which the Heritage Program is responsible from artifacts to cultural landscapes without regard to eligibility for listing on the National Register of Historic Places.”

2. **Tribal consultation** refers to soliciting, discussing, and considering the views of federally recognized tribes as means to accommodate, where feasible, tribes' interests and preferences.<sup>3</sup> Early, stepwise tribal consultations during the planning, assessment, and implementation of actions that may or will affect current or former Indian lands generally boosts the timeliness, efficiency, and effectiveness of those actions. Several generations of community, government, and science leaders working in and around Indian Country now understand and have demonstrated why and how to solicit and consider the knowledge and wisdom of the people most familiar with lands and resources affected by proposed actions. Federal officials are obliged to lead government-to-government relations with tribes, to recognize federal fiduciary duty for the welfare of tribes and individual American Indians, and to create opportunities for cooperation and engagement.<sup>4</sup>

The National Environmental Policy Act (NEPA) and the resultant DEIS represent a unique opportunity for TNF to harness consultative collaboration, public involvement, and best-available science by engaging tribes and public stakeholders in identifying and working toward the best possible RCPLx outcomes without unnecessarily depriving present and future generations of healthy, diverse, and productive lands, waters, air, and cultural resources. TNF has determined to use the NEPA process to involve the public in the Section 106 process for RCPLx, thereby “funneling” and otherwise limiting public involvement opportunities into NEPA scoping and DEIS commenting. Scoping comments from 2016 reveal that TNF received detailed and substantive input regarding pertinent mandates to “assure that the full range of cultural resources is identified and documented” and to “assure that the full range of values associated with the identified cultural resources is assessed and taken into consideration and that this consideration is reflected in Federal decisions and commitments” and to “assure that the range of likely and reasonably foreseeable PRCM [proposed Resolution Copper mine] effects and impacts to cultural resources and cultural resource values are identified, considered, and addressed” and to “assure that the full range of treatment options and alternatives is considered to avoid and reduce harm to cultural resources” and to “assure that each of the foregoing four steps is completed in close consultation with the San Carlos Apache Tribe, with other affected tribes, and with other parties having interests and values linked to cultural resources threatened by the PRCM.”<sup>5</sup>

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<sup>3</sup> This definition builds on the regulations implementing Section 106 of the National Historic Preservation Act (36 CFR § 800.16(f)). For a more inclusive perspective see G. S. Galanda (2011) The Federal Indian Consultation Right, <http://apps.americanbar.org/buslaw/committees/CL121000pub/newsletter/201101/galanda.pdf>

<sup>4</sup> See Advisory Council on Historic Preservation Policy Statement on Balancing Cultural and Natural Values on Federal Lands, December 20, 2002, <https://www.achp.gov/digital-library-section-106-landing/achp-policy-statement-balancing-cultural-and-natural-values>.

<sup>5</sup> July 18, 2016 letter from San Carlos Apache Tribe Chairman Terry Rambler to Neil Bosworth. See also, [https://businessdocbox.com/Green\\_Solutions/76786942-Resolution-copper-project-and-land-exchange-environmental-impact-statement.html](https://businessdocbox.com/Green_Solutions/76786942-Resolution-copper-project-and-land-exchange-environmental-impact-statement.html).

Given the reasonableness of these comments and their clear alignment with applicable Federal laws and policies, we are dismayed to find so little information regarding cultural resources in the DEIS, and almost no evidence of prior consultation. The information provided is unequivocally insufficient to enable public analysis and input. The RCPLx DEIS Section 1.7.4 acknowledges that RCPLx

“would profoundly and permanently alter the National Register of Historic Places (NRHP)-listed *Chí'chil Bitdagoteel* (Oak Flat) Historic District Traditional Cultural Property (TCP) through anticipated large-scale geological subsidence.... development of the proposed tailings storage facility at any of the four proposed or alternative locations would permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials.”

TNF presents DEIS Section 3.12 to satisfy NEPA requirements by describing potentially affected cultural resources, RCPLx effects on those resources, and Section 106 requirements (at 36 CFR 800.2(d)(3)) to “provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.” Instead of satisfying these clear mandates, however, Section 3.12 provides a general, two-page summary of regional culture history, a one-paragraph description of methods used to identify cultural resources, and a sterile statistical abstract of cultural resource sites significantly impacted / adversely affected by the six planning alternatives and across the direct, indirect, and atmospheric impact areas. The entirety of the DEIS description of affected cultural resources is readily reproduced in seven short bullet points:

- “inventories have resulted in the recordation of 721 archaeological sites and three historical buildings or structures within the direct analysis area” (DEIS pg. 627); and
- “Of the 721 sites, 523 are recommended or determined eligible for the NRHP, 118 are recommended or determined not eligible for the NRHP, 78 are undetermined, and two are exempt from Section 106 compliance” (DEIS pg. 628); and
- “site components are attributed to Archaic peoples (19), Hohokam (81), Hohokam-Salado (73), Salado (330), Apache-Yavapai (25), Native American (116), Euro-American (189), and unknown (4). Archaeological sites found in the analysis area represent short- and longterm habitations, agricultural sites, resource procurement and processing sites, campsites, a historic-age campground, communication sites, ranching sites, mining sites, soil conservation, utilities, transportation (roads and trails), recreation activities, water management, and waste management” (DEIS pg. 628); and
- “One NRHP-listed TCP is located within the direct analysis area” (DEIS pg. 628); and
- “Twenty-one historic buildings or structures have been recorded within the direct analysis area” (17 of which are associated with the Magma Mine; 14 of the 17 have already been demolished; TNF considers the other 4 not eligible for NRHP) (DEIS pg. 628); and
- “Applicant-committed environmental protection measures by Resolution Copper to reduce impacts on cultural resources are covered in detail in the Programmatic Agreement” (DEIS pg. 630); and, finally

- “Mitigation of adverse effects on historic properties eligible for the NRHP under Criterion D, the potential to provide significant information about the past, most often consists of data recovery to gather the information prior to disturbance. A Programmatic Agreement (see appendix O) is currently being developed to address adverse effects on historic properties under Section 106 of the NHPA. Mitigation of adverse effects on historic properties eligible for the NRHP under Criterion A, B, or C would be developed in consultation with the appropriate Indian Tribes, SHPO, and other interested parties and would be outlined in a historic properties treatment plan and/or a TCP Redress Plan as stipulated by the PA” (DEIS pg. 638).

These seven bullet points and the draft (version 5) Programmatic Agreement represent the entirety of substantive cultural resource description and analysis included in the DEIS and made available to enlist public involvement in the RCPLx Section 106 process. Our comment is that the roughly 350 words represented by the seven bullet points—less than one word per cultural resource site slated for irrevocable alteration by RCPLx—unmistakably fail to meet any meaningful test, qualitative or quantitative, of disclosure or analysis. The DEIS Appendix J “Mitigation and Monitoring Plan” for the project contains a one-word entry for cultural resources: “None” (DEIS pg. 37).

The Programmatic Agreement must, of course, provide project- and context-specific information and protocols to assist the public and other consulting parties in advising and assisting TNF in meeting its historic property identification, evaluation, and effect assessment, avoidance, and reduction mandates. But the draft agreement document is DEIS Appendix O is an error-ridden, incomplete, and outdated draft. Version 5 confirms that the cultural resource inventory process is still ongoing, that tribes have not been and are not scheduled to be consulted, as required by the regulations at 36 CFR Part 800, in each step in the Section 106 process, and that TNF has forsaken and ignored the consultative recommendations included in the 2015 Ethnographic and Ethnohistoric Study, compiled with the assistance of 94 designated tribal representatives in favor of an incompletely described Tribal Monitoring Program.<sup>6</sup> Version 5 provides no meaningful consideration of the historic built environment, especially Superior’s historic structures, and no substantive descriptions of plans for the resolution of adverse effects. Our follow-up inquiries have revealed that the Arizona State Historic Preservation Officer and the Advisory Council on Historic Preservation are similarly concerned about the lack of an executed Programmatic Agreement, the un-phased and partitioned approach TNF has used in Section 106 consultations, and the Tribal Monitoring Program.<sup>7</sup> We know from recent correspondence that consulting parties, notably

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<sup>6</sup> Hopkins, M. P., C. Colwell, T. J. Ferguson, and S. L. Hedquist (2015) Ethnographic and Ethnohistoric Study of the Superior Area, Arizona. Prepared for Tonto National Forest and Resolution Copper. Anthropological Research LLC., Tucson.

<sup>7</sup> September 19, 2019 letter from Arizona State Historic Preservation Officer Kathryn Leonard to Tonto National Forest Supervisor Neil Bosworth; October 25, 2019 letter from Advisory Council on Historic Preservation Federal Property Management Section Assistant Director Tom McCulloch to Tonto National Forest Supervisor Neil Bosworth.



excluding the public, have now provided comments on Programmatic Agreement version 6, and that a release of version 7 is imminent.

Our review finds that TNF has, in the RCPLx DEIS, neglected its non-discretionary duties, pursuant to per 36 CFR 800.2(d)(1), to “seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties.” Please advise us, per 36 CFR 800.3(e), of the mandatory “plan for involving the public in the section 106 process.”

We conclude from the above that TNF should promptly release for public inspection and comment a substantially complete and error-free Programmatic Agreement, presumably version 7, and other information, per 36 CFR 800.11(a), to ensure that any TNF “determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds.” Because TNF has committed to using the NEPA process to satisfy its NHPA public involvement mandates, the DEIS comment period would need to be extended by at least 30 days following the release of the required documentation to enable public review and comment well in advance of any final environmental impact statement.

Archaeology Southwest appreciates the opportunity to provide these comments. We look forward to continued collaboration with TNF, tribes, and stakeholders to minimize adverse effects and significant impacts threatened by the proposed RCPLx.

William H. Doelle, Ph.D.  
President and CEO  
[wdoelle@archaeologysouthwest.org](mailto:wdoelle@archaeologysouthwest.org)

John R. Welch, Ph.D.  
Landscape & Site Preservation  
Program Director  
[JRWelch@archaeologysouthwest.org](mailto:JRWelch@archaeologysouthwest.org)

cc.  
Hon. Terry Rambler, San Carlos Apache Tribe Chairman. [trambler@scatui.net](mailto:trambler@scatui.net)  
Hon. Gwendena Lee-Gatewood, White Mountain Apache Tribe Chairwoman. [gwendena@wmat.us](mailto:gwendena@wmat.us)  
Kathryn Leonard, Arizona State Historic Preservation Office. [kleonard@azstateparks.gov](mailto:kleonard@azstateparks.gov)  
John Fowler, Advisory Council on Historic Preservation Executive Director. [jfowler@achp.gov](mailto:jfowler@achp.gov)  
Maria Dadgar, Inter Tribal Council of Arizona Executive Director. [info@itcaonline.com](mailto:info@itcaonline.com)